U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

DMB:SA
F.#2011R01313

October 4, 2012

To Be Filed Under Seal

The Honorable Marilyn D. Go
United States Magistrate Judge
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. John Doe
Criminal Docket No. 12-CR-134 (ERK)(MDG)

Dear Judge Go:

The government writes to inform the Court that, on October 5, 2012 at 4:30 p.m., the above-referenced defendant is scheduled to make his initial appearance in the Eastern District of New York following his extradition from Italy, and to be arraigned on the indictment. The defendant is charged with crimes related to his terrorist activities on behalf of al-Qaeda between approximately 2001 and the present.

For the reasons set forth below, the government respectfully moves the Court to close the courtroom for this proceeding; seal the transcript of the proceeding; approve the use of the name "John Doe" in place of the defendant's true name on the Court's public docket; and seal this letter and any order the Court enters in connection with this motion. In addition, the government further respectfully requests that: (1) a public hearing on this motion be scheduled for October 5, 2012 at 4:30 p.m.; (2) the Court's public calendar reflect that the government has filed a motion for courtroom closure, along with the time and place of the hearing; (3) the public docket sheet in the above-referenced case reflect that a motion for courtroom closure has been filed, as well as the date, time and place of the hearing on the motion; and (4) the docket sheet and the Court's calendar for the dates of the hearing and the arraignment not include the defendant's name or list the pending charges, but rather use the

caption United States v. John Doe. Finally, the government respectfully requests that, after holding a public hearing, the Court enter the enclosed proposed order regarding courtroom closure and sealing.

I. Background

Beginning in approximately 2001, the defendant, a citizen of Niger who was born in Saudi Arabia, traveled from Saudi Arabia to Afghanistan with the intent to fight violent jihad on behalf of Islam. The defendant arrived in Afghanistan shortly before the September 11, 2001 attacks. He joined al-Qaeda, received military-type training at al-Qaeda training camps, and ultimately fought against United States and Coalition forces in Afghanistan with an al-Qaeda fighting group based in Pakistan. In approximately 2003, in Pakistan, the defendant received further al-Qaeda training on so-called "external operations," and traveled from Pakistan to Nigeria with the intent to conduct attacks on United States diplomatic facilities in Nigeria. After the arrest of a co-conspirator, the defendant traveled from Nigeria to Niger, and then onward to Libya, from where he hoped to reach Europe. In approximately early 2005, the defendant was apprehended in Libya, and he remained in Libyan custody until approximately June 2011, when he was released by the Libyan government and, according to his own account, placed on a refugee ship bound for Italy. The defendant was arrested on the refugee ship after proclaiming his affiliation with al-Qaeda and assaulting Italian officers on board the ship.

On February 21, 2012, a grand jury sitting in the Eastern District of New York charged the defendant with (1) conspiring to murder United States nationals; (2) conspiring to bomb United States government facilities; (3) providing material support to al-Qaeda; (4) conspiring to provide material support to al-Qaeda; (5) using firearms in furtherance of crimes of violence; and (6) using explosives in furtherance of crimes of violence. The government subsequently sought the defendant's extradition from Italy, and, on July 5, 2012, the Naples Court of Appeals ordered the defendant extradited to face the charges in the indictment. Agents of the Federal Bureau of Investigation ("FBI") New York Joint Terrorism Task Force took the defendant into custody in Italy on October 4, 2012, and he arrived in the United States at John F. Kennedy International Airport in Queens, New York on that same day.

Between September 14 and September 16, 2011, the government conducted a voluntary interview of the defendant in Italian custody. The interview was conducted in the presence of

the defendant's Italian counsel and before an Italian judge, and was audiotaped. Prior to each day of interviews, the defendant was informed of, and waived, his Miranda rights. Based in part on his statements over those three days of interviews, the government believes that the defendant may be in a position to provide the government with information relevant to the national security of the United States. Specifically, the defendant, through his activities on behalf of al-Qaeda beginning over a decade ago, was in direct contact with numerous prominent al-Qaeda leaders, trainers, and fighters. While in Africa, the defendant was also in direct contact with numerous members of other extremist Islamist groups, which groups are currently affiliated with al-Qaeda or otherwise target Westerners. Should the defendant continue to provide information to the government, it is possible that such information would permit the government to learn of terrorist plots, identify terrorist operatives, and potentially seek criminal process for those operatives or related evidence.

Should the defendant's arrest and extradition to the United States become public before the government has had an opportunity to assess any such information, however, the government may lose the opportunity to take full advantage of that information due to the flight of terrorist operatives or the destruction of evidence. [redacted]

The government's indictment is filed under seal. Although the Italian extradition proceedings were not held under seal, no media attention was drawn to them, and the government is not aware of any public information about the defendant's arrest or connection to al-Qaeda. A preliminary period of closure will thus permit the government and the defendant to evaluate whether the defendant is in a position to provide additional information to the government, the present usefulness of any such information, the need for secrecy regarding the information, [redacted]

II. Analysis

In United States v. Alcantara, 396 F.3d 189 (2d Cir. 2005), the Second Circuit set forth the procedures to be followed before a district court may close a court proceeding. The court explained as follows:

> [A] motion for courtroom closure should be docketed in the public docket files maintained in the court clerk's office. The motion itself may be filed under seal, when appropriate, by leave of court, but the publicly maintained docket entries should reflect the fact that the motion was filed, the fact that the motion and any supporting or opposing papers were filed under seal, the time and place of any hearing on the motion, the occurrence of such hearing, the disposition of the motion, and the fact of courtroom closure, whether ordered upon motion of a party or by the Court sua sponte. Entries on the docket should be made promptly, normally on the day the pertinent event occurs.

Id. at 200 (citations omitted). This letter constitutes the motion contemplated in Alcantara.

The Second Circuit in Alcantara also reiterated that "[b]efore excluding the public from [plea and sentencing] proceedings, district courts must make findings on the record demonstrating the need for the exclusion." Id. at 192. It observed that "[t]he power to close a courtroom where proceedings are being conducted during the course of a criminal prosecution . . . is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances and for very clear and apparent reasons." Id. at 192 (quoting United States v. Cojab, 996 F.2d 1401, 1405 (2d Cir. 1993)).

The Second Circuit has identified "four steps that a district court must follow in deciding a motion for closure." United States v. John Doe, 63 F.3d 121, 128 (2d Cir. 1995). First, the district court must identify, through specific findings, whether there exists "a substantial probability of prejudice to a compelling interest of the defendant, government or third party." Id. The Circuit has provided specific, illustrative examples of such compelling interests, including the defendant's right to a fair trial, the privacy interests of the

defendant, victims or other persons, "the integrity of significant government activities entitled to confidentiality, such as ongoing undercover investigations or detection devices," and danger to persons or property, id., as well as protection of the secrecy of grand jury matters and an ongoing criminal investigation. United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988) (upholding sealing portion of plea agreement to protect investigation). With respect to danger to persons, the Second Circuit has held that evidence of a direct threat, though powerful evidence of danger, is not "a strict condition precedent to a district court's granting of a closure motion." Doe, 63 F.3d at 130. Moreover, according to the Second Circuit, "[t]he problem of retaliatory acts against those producing adverse testimony is especially acute in the context of criminal organizations." Id. With respect to the integrity of significant government activity, such as grand jury and criminal investigations, the Second Circuit has highlighted the concern that public proceedings and documents exposing a cooperating witness could alert "potential targets of the investigation," cause the witness "to be reluctant about testifying," and expose innocent subjects of the investigation to "public embarrassment." Haller, 837 F.2d at 88.

Second, where a substantial probability of prejudice is found, the district court must consider whether reasonable alternatives to closure can protect the compelling interest. Doe, 63 F.3d at 128. Third, the district court must decide whether the prejudice to the compelling interest overrides the qualified First Amendment right of access. Id. Finally, if the determination is made that closure is warranted, the Court must devise a closure order that is narrowly tailored to protect the compelling interest. Id. It should be noted that the law does not require that closure be "the least restrictive means available to protect the endangered interest." Id. (citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)).

Here, as is evident from the information set forth above, a public proceeding under a case caption using the defendant's true name would result in the substantial probability of prejudice to compelling interests of the defendant and the government. In particular, a public arraignment proceeding would prejudice a compelling interest of the government in attempting to obtain information potentially relevant to the national security of the United States. As noted above, the Second Circuit has expressly identified danger to persons and property and integrity of criminal investigations as compelling interests that can warrant closure of the courtroom and sealing of

transcripts and agreements. Doe, 63 F.3d at 128 (citing United States v. Raffoul, 826 F.2d 218, 226 (3d Cir. 1987)); In re Herald Co., 734 F.2d 93, 100 (2d Cir. 1984); Haller, 837 F.2d at 87.

Based on the information set forth above, it is also apparent that no reasonable alternatives to closure of the courtroom exist that would adequately protect the compelling interests of the government and the defendant. The government must present the defendant to the Court and arraign the defendant in a courtroom without undue delay.

Finally, the government submits that the prejudice to compelling interests described above far outweigh the qualified First Amendment right of the public and the media to access the proceedings. The government's investigation concerns matters of national security, and secrecy may be necessary to permit the government to exploit any information provided. Moreover, by ordering that the government disclose the transcript of the proceedings as required by Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), 18 U.S.C. § 3500 and/or Rule 16 of the Federal Rules of Criminal Procedure and requiring the parties to move to unseal the transcript once the likely prejudice to their compelling interests no longer outweighs the qualified right to access, the Court can narrowly tailor the closure.

Accordingly, the government respectfully requests that, after holding a public hearing, the Court enter the proposed order, which contains findings reflecting: (a) the substantial probability that a public proceeding would prejudice the compelling interests identified above; (b) the lack of reasonable alternatives to courtroom closure; and (c) that the prejudice to the compelling interests overrides the qualified right of the public and the media to access the proceedings.

III. Conclusion

The government respectfully requests that the Court file this letter under seal and hold a public hearing on the motion to close the courtroom for the arraignment proceeding. In order to comply with Alcantara's notice requirements, the government requests that: (1) the Court's public calendar reflect that the government has filed a motion for courtroom closure, along with the time and place of the hearing; (2) the public docket sheet in the above-captioned case reflect that a motion for courtroom closure has been filed, as well as the date, time and place of the hearing on the motion; and (3) the docket sheet

and the Court's calendar not include the defendant's name, but rather reflect the caption United States v. John Doe. Finally, the government respectfully requests that, after holding a public hearing, the Court enter the enclosed proposed order regarding courtroom closure and sealing.

Counsel for the defendant join in the motion to close the courtroom and the other relief requested herein.

Respectfully submitted,

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Enclosure

cc: Susan Kellman, Esq.
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